



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
(CORAM: MURGOR, JA – IN CHAMBERS)
CIVIL APPLICATION NO. NAI 192 of 2017

BETWEEN

BRIAN YONGO.....APPLICANT

AND

DR. JIGISHA P. JANI.....1ST RESPONDENT

JAY SAILESH JANI.....2ND RESPONDENT

NEPTUNE CREDIT MANAGEMENT LIMITED.....3RD RESPONDENT

(An Application for extension of time to file and serve a Notice and Record of Appeal out of time in an intended appeal from a Ruling of the High Court of Kenya at Nairobi (Gacheru, J.) delivered and date 23rd June, 2017)

in

ELC CASE NO. 13 of 2009)

RULING

The applicant, Brian Yongo has brought this Notice of Motion dated 14th August 2017 under **Article 159** of the Constitution, **section 3A** of the Appellate Jurisdiction Act and **rules 4** and **42** of the rules of this Court seeking for time to be extended within which to file and serve a notice of appeal and the record of appeal.

The motion is premised on the grounds that the ruling dated 23rd June 2017 that the applicant intends to appeal against and which dismissed the applicant's applications dated 6th August 2014, 13th July, 2015 and 14th August, 2015 with costs was delivered in the applicant's absence; that he did not become aware of the ruling until 31st July, 2017, when the advocates for **Neptune Credit Management Limited, the 3rd respondent**, Messrs. Oruenjo, Kibet Khalid & Co. Advocates, informed him that he had been served with a mention notice by Messrs. Desai, Servia & Pallan Advocates for **Dr. Jigisha P. Jani** and **Jay Sailesh**

Jani, the 1st and 2nd respondents.

It was further contended that upon perusal of the court file, he discovered the ruling had been delivered without a ruling notice having been served on him. The applicant further contended that he was aggrieved by the ruling and wished to appeal against that decision; that the intended appeal has overwhelming chances of success evidenced by the Draft Memorandum of Appeal; on the basis that the auctioneers licensing board had found that the respondents' agent Muhatia Pala had misconducted himself by purporting to illegally and unlawfully distress and take away his household items in contravention of a Consent Order issued on 19th April 2010 by Sitati, J. The applicant also claimed that the respondents and their agent were holding his household items against payment of alleged auctioneer fees and in exercise of their right to hold the goods in lieu of payment which was illegal and unlawful.

The motion is supported by the affidavit of the applicant sworn on the same day and which to a large extent reiterate the grounds highlighted in the motion.

In a replying affidavit sworn by Jigisha P. Jani on 26th September 2017 it was deponed that following the hearing of the applicant's applications, the court reserved the rulings for 9th February 2017; that the ruling was subsequently delivered on 23rd June 2017 in the presence of the respondent's advocate, but without attendance of either the applicant, or the 3rd respondent; that the court observed that the 3rd respondent was served, but the applicant could not be traced for service.

It was further deponed that the 1st respondent would suffer grave prejudice if time to file the appeal was extended as the suit in the lower court had been pending for ten years, and that the applicant has sought to delay its determination by filing numerous applications whilst continuing to occupy the respondents' property; that the applicant currently owes the respondents a sum of Kshs 5,150,850.

When the parties appeared before me on 17th October, 2017 learned counsel **Mr. Sarvia** for the 1st and 2nd respondents and **Ms. Wanjiku** who was holding brief for Mr. Oruenjo for the 3rd respondent, were informed that Mr. Brian Yongo, the applicant is known to me and as a consequence I was willing to disqualify myself from hearing the application, as neither of the parties had any objection, I proceeded to hear it accordingly.

During the hearing of the application, Mr. Yongo, the applicant who appeared in person stated that he wish to withdraw prayer two of the application as this was a matter that was not within the remit of a single judge to determine. As both Mr. Sarvia and Ms. Wanjiku had no objection, prayer two was withdrawn from the application.

In his submissions, Mr. Yongo reiterated the grounds of the motion and the averments in his affidavit, and added that he was indisposed on the date of the ruling. It was also submitted that he had since requested for the certified copies of the typed proceedings and the ruling. His plea was that the Court extend time to enable him file his appeal, as to decline to do so, would be to deny him substantive justice.

Ms. Wanjiku supported the application on the basis that the delay in filing the appeal was not inordinate, the ruling having been delivered on the 23rd June 2017, and that in the interest of justice and adherence to the provisions of the Constitution, the applicant has a right to be heard.

Relying on the 1st and 2nd respondents' replying affidavit, Mr. Sarvia, opposed the application. Counsel submitted that though the applicant had admitted that he was unaware of the ruling date, the ruling notice had been served on the 3rd respondents advocates; that applicant is a director of the 3rd respondent and the instructing client to the advocates on record for the 3rd respondent, and therefore, the applicant and the 3rd respondent ought to be treated as one and the same party; that no explanation was provided to explain why the 3rd respondent did not attend the delivery of the ruling, and that the applicant had admitted that he came to know of the ruling after the 3rd respondent advocates were served with the mention notice.

Counsel further submitted that, the application was intended to delay the hearing and determination of the main suit in the Environment and Land Court which has been pending for ten years; that the intended appeal is aimed at effectively restraining the 1st and 2nd respondents from levying distress for rent on the applicant and the 3rd respondent. Counsel stated that the Court should decline to extend time to file the appeal so as to pave way for the suit in the lower court to be heard and determined.

In rebuttal, Mr. Yongo stated that despite the respondents' averments and submissions, he had sufficiently demonstrated that the delay was not inordinate.

The principles that guide a court in considering an application for leave to file an appeal out of time ***under rule 4*** of this Court's rules were laid down by this Court in the case of ***Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited [2015] eKLR*** thus;

"The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.

Mutisovs Mwangi, Civil Appln No. Nai 255 Of 1997 (UR), Mwangi vs Kenya Airways Ltd, [2003] KLR 486 and Fakir Mohammed vs Joseph Mugambi & 2 Others, Civil Appln No. Nai 332 Of 2004 (unreported) where this Court rendered itself thus;

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors."

The ruling of the Environment and Land Court was delivered on 23rd June 2017. This application was filed on 15th August, 2017, about one month and three weeks after the decision of that court.

As to whether this delay has been explained, it is not in dispute that subsequent to hearing the applicant's applications, the Environment and Land Court reserved the date for delivery of the ruling to the 9th February 2017, but which was not delivered until 23rd June 2017. According to the respondents, the ruling was delivered in the presence of the respondent's advocate, but without representation of either the applicant or the 3rd respondent. On the material day the court stated;

"Ruling read in open court in the presence of Mr. Sarvia for the Defendants and absence of Plaintiffs though 1st Plaintiff's advocate was served and 2nd Plaintiff who acts in person could not be traced as per the Ruling Notice filed in court."

The inference here is that since the applicant could not be traced, he did not receive the ruling notice and therefore would not have been expected to attend court on the material day, with the result that he would not have been aware that the ruling was delivered. Needless to say that without such notice having been served on him, he cannot be faulted for failing to attend court.

That said, the applicant claims that he was not notified of the delivery of the ruling until 31st July 2017, after the 3rd respondent advocates were served with a mention notice indicating that the suit had been set down for hearing on 3rd August 2017. This was about five weeks after the ruling was delivered. To my mind, he would not have known of the ruling date unless he visited the Registry, or was notified by the

respondents or their advocate. In this case, it was after the respondents' advocates served the 3rd respondent with a mention notice that the applicant learnt of the delivery of the ruling, which in my view, reasonably explains the delay of five weeks.

It then took another two weeks, from the date he learnt of the ruling until this application was filed. The record show that upon becoming aware of the ruling, the applicant immediately applied for the proceedings on 1st August 2017, compiled the record and then lodged this application on 15th August 2017.

Bearing in mind the above circumstances that occasioned the delay in the first instance, there is in my view sufficient justification to grant the extension of time sought.

This brings me to the aspect of the chances of success of the intended appeal. The draft Memorandum of Appeal sets out several grounds of appeal. Central to the applicant's complaint is a Consent Order between the parties and issued on 19th April 2010, and the question of whether or not it entitled the respondents to proceed to levy of distress on the applicant and the 3rd respondent in the event of failure to comply with its terms. Without going into the merits of the appeal which is the preserve of a full bench, my view is that the intended appeal is not frivolous or unwarranted, and the applicant should have the opportunity to ventilate the issues in contention before this Court.

On the final issue of whether any prejudice would be visited on the respondents if the application to extend time were granted. Other than the inconvenience of having to defend the appeal and momentary interruption in the hearing of the main suit in the court below, which can be compensated in costs, there does not seem to me any significant prejudice that would result.

For the above reasons, I exercise my discretion to grant an extension of time to file and serve the Notice of Appeal which extension will lapse **seven days** from the date of this Ruling. The Memorandum and record of appeal must be lodged in accordance with **rule 81** of this Court's rules and time for such lodging will commence running from the date of lodging the Notice of Appeal within the period of extension specified in this Ruling. The costs of this application shall be in the intended appeal.

It is so ordered.

Dated and Delivered at Nairobi this 24th day of November, 2017.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR